A

PP v. V VIGNESWARAN NAIDU VENKATARAREMA NAIDU & OTHER CASES

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[CRIMINAL TRIAL NOS: AA-45JT-1-07-2020,
B AA-45JT-2-07-2020, AA-45JT-3-07-2020,
AA-45JT-4-07-2020, AA-45JT-5-07-2020,
AA-45JT-6-07-2020, AA-45JT-7-07-2020,
AA-45JT-8-07-2020, AA-45JT-9-07-2020
& AA-45JT-10-07-2020]
C 3 SEPTEMBER 2021

LEGAL PROFESSION: *Representation by counsel – Counsel potential witness – Counsel put against witness during cross-examination – Whether material fact – Whether counsel ought to be called as witness – Possibility of allegation being*
D *extremely prejudicial towards accused if positive evidence tendered – Whether in contravention of r. 28 of Legal Profession (Practice and Etiquette) Rules 1978*

EVIDENCE: *Witnesses – Counsel potential witness – Counsel put against witness during cross-examination – Whether material fact – Whether there was implied meaning that positive evidence would be tendered to prove allegation – Whether*
E *counsel ought to be called as witness – Possibility of allegation being extremely prejudicial towards accused if positive evidence tendered – Whether in contravention of r. 28 of Legal Profession (Practice and Etiquette) Rules 1978*

Ten accused persons were charged under s. 130V(1) of the Penal Code for
F being members of an organised criminal group and they were tried jointly. During cross-examination conducted by five of the accused persons' lead counsel ('counsel') towards SP6 (arresting officer) and other witnesses, he raised several issues, based upon his own personal knowledge, namely: (i) the arresting officer who conducted the arrest of one of the accused persons was not SP6, but another officer, one 'ASP Zain'; and (ii) whether caution had
G been administered before the arrest was done ('contradictions'). In support of his allegations, counsel contended that he was there at the place of the arrest and saw how it was effected. Towards the contradictions raised, the court queried counsel on whether he was putting forward what he saw. Counsel affirmed it, but only on the arrest. Taking into consideration, *inter*
H *alia*, that (i) matters put by counsels during cross-examination would have an implication that positive evidence would be called to prove it as per *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal*; (ii) r. 28 of the Legal Professions (Practice and Etiquette) Rules 1978 which provides an advocate and solicitor could not appear in a case where he was the witness; and
I (iii) the contradictions had the possibility of putting a stain on the witnesses' credibility; and (iv) an issue arose, on whether counsel ought to be restrained from continuing to represent the five accused persons so as to preserve the integrity of the administration of justice.

Held (restraining counsel from further representing five accused persons):

(1) With the counsel mounting a direct challenge against SP6, based upon his avowed personal knowledge, which was not a fact which the court ought to take judicial notice of, he should be aware of the consequences, that there would be an implication of positive evidence being tendered through himself. Although *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* was a civil case, the principle of 'putting' to a witness applies equally to criminal proceedings. (paras 31 & 32)

(2) Regardless of the identity of the arresting officer involved in the arrest of one of the accused persons, it was a material fact that would go towards the credibility of SP6 who had taken an oath to tell the truth, the whole truth and nothing but the truth. Hence, it would have an impact on (i) the assessment of the credibility of the witnesses; (ii) the prosecution's and defence cases; (iii) the testimony of one or more of prospective witnesses such as ASP Zain; and (iv) the credibility of the other arresting officers challenged by other counsels. Thus, in the event the contradictions become material as the trial develops, it would become extremely prejudicial towards the accused persons. For the sake of preserving the integrity of the administration of justice, counsel ought to be restrained from further representing any of the accused persons. (paras 26, 33 & 35)

Case(s) referred to:

Ahmad Sultan VPS Abdulla v. MSZ Projects Sdn Bhd [2018] 2 LNS 1203 ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Emperor v. Dadu Rama Surde 1939 41 BOMLR 282 ***(refd)***
He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***
Lim Liah Wee v. PP [2021] 7 CLJ 448 HC ***(refd)***
Mohd Zaharani Harun v. PP [2021] 1 LNS 840 HC ***(refd)***
Ng Siew Lan v. John Lee Tsun Vui & Anor [2017] 2 CLJ 245 FC ***(refd)***
Ng Yee Hong v. Malaysian Institute of Accountants [2021] 1 CLJ 666 CA ***(refd)***
Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 8 CLJ 163 FC ***(refd)***
Panetra Parking Services Sdn Bhd & Ors v. TTDI Harta Sdn Bhd & Another Application [2021] 6 CLJ 129 HC ***(refd)***
PP lwn. Chong Yoke Choy [1994] 3 CLJ 718 HC ***(refd)***
PP v. N Vengadasalam & Ors [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893 HC ***(refd)***
Quah Poh Keat & Ors v. Ranjit Singh Taram Singh [2009] 4 CLJ 316 CA ***(refd)***
Saminathan v. PP [1936] 1 LNS 65 HC ***(refd)***
Saw Kim Hai & Anor v. Regina [1955] 1 LNS 140 HC ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754 HC ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram [2000] 4 CLJ 870 FC ***(refd)***

A *Wee Choo Keong v. PP [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 HC* ***(refd)***
Yahya Hussein Mohsen Abdulrab v. PP [2020] 1 LNS 1239 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(1)(a)
Criminal Procedure Code, s. 112
B Legal Profession (Practice and Etiquette) Rules 1978, r. 28(1)

Other source(s) referred to:
Mahadev Shankar, *Putting and Suggesting in Cross-examination,* [1984] MLJ xi

For the prosecution - Mohd Sabri Othman, Mohd Izhanudin Alias, Nur Ainaa Ridzwan & Mohd Farhan Aliff Ahmad; DPPs
C *For the 1st, 3rd, 4th, 6th & 8th accused - Charan Singh Kartar Singh & Noorfarihah Arshad; M/s Nurul & Charan*
For the 2nd, 5th, 7th & 9th accused - Nahtan N Krishnan & Dayang Nor Emilia Azman Shah; M/s Naht, Guna & Partners
For the 10th accused - Vijayandran K Thanigasalam; M/s Vijay & Co

D *Reported by Syamim Ariffin*

JUDGMENT

Su Tiang Joo JC:

Introduction

E **[1]** In the midst of the prosecution case of a joint-trial against ten accused, lead counsel for five of them namely; i) V.Vigneswaran Naidu a/l Venkatararema Naidu, ii) Ganesan a/l Durasamy, iii) Velmurugan a/l Paniresilvam, iv) Entiran a/l Durasamy and v) Ganasen a/l Kupusamy (hereinafter unless expressly individually referred to by their respective
F names shall be referred to as "the said five accused"), this court was constrained to make a decision on 18 August 2021 that for the sake of preserving the integrity of the due administration of justice, that lead counsel, Mr. Charan Singh s/o Kartar Singh who was acting for the said five accused was to be restrained from continuing to act for any of the accused in this joint
G trial. Dissatisfied, each of the said five accused whom Mr. Charan Singh s/o Kartar Singh was acting for, had filed a notice of appeal (encls. 17, 34, 32, 31, 31 respectively) all dated 20 August 2021 to appeal against this decision to the Court of Appeal.

[2] As the joint-trial is on-going, this court will only set out the salient
H facts and assertions necessary for purposes of setting out the grounds for the decision made and these ought not to be taken as the court having made a determinative finding on the truth or otherwise of the evidence led thus far.

I

Preliminary Observation

[3] It is doubtful that such a decision is appealable. Section 50(1)(a) and s. 3 of Courts of Judicature Act 1964 (Revised 1972) Act 91 ("CJA") provides that:

> *Section 50(1):* Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against *any decision* made by the High Court:
>
> (a) *in the exercise of its original jurisdiction.*
>
> *Section 3:*
>
> "decision" means judgment, sentence or order, *but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;*
>
> (emphasis added)

[4] The above provisions in s. 50(1)(a) read together with s. 3 of the CJA were discussed in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 by the Court of Appeal which held that:

> [1] There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal.
>
> [1a] There is no provision in the Criminal Procedure Code or in the current version of the CJA (ie, after the amendment to s. 3 on the meaning of "decision" by Amendment Act A1031) which gives a right of appeal from an order of the High Court granting or refusing to grant bail. *Section 50 of the CJA provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals, since the amendment to s. 3 ('the 1998 amendment'), are now to be confined to decisions which would have the effect of finally disposing of the rights of the parties.* The 1998 amendment, thus, excludes the type of judgments and orders which are termed as "interlocutory".
>
> [2] *What the 1998 amendment means is that, a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 CJA, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals.*

[5] However, to facilitate the challenge by the said five accused, these grounds are put up promptly as the joint-trial is scheduled to be continued from 15 November 2021 to 18 November 2021.

A **Salient (Uncontentious) Background Facts**

[6] The respective ten accused were charged as follows:

(i) V.Vigneswaran Naidu a/l Venkatararema Naidu in HC Ipoh

AA-45JT-1-07-2020

B Pertuduhan

Bahawa kamu di antara tahun 2014 dan 27.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di C bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(ii) Vinodh a/l Siva Kumar in HC Ipoh

AA-45JT-2-07-2020

D Pertuduhan

Bahawa kamu di antara tahun 2014 dan 13.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di E bawah s. 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(iii) Ganesan a/l Durasamy in HC Ipoh

AA-45JT-3-07-2020

F Pertuduhan

Bahawa kamu di antara tahun 2014 dan 13.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di G bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(iv) Velmurugan a/l Paniresilvam in HC Ipoh

AA-45JT-4-07-2020

H Pertuduhan

Bahawa kamu di antara tahun 2014 dan 13.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di I bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(v) Anand Kumar a/l Siva Kumar in HC Ipoh

AA-45JT-5-07-2020

Pertuduhan

Bahawa kamu di antara tahun 2014 dan 13.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(vi) Entiran a/l Durasamy in HC Ipoh

AA-45JT-6-07-2020

Pertuduhan

Bahawa kamu di antara tahun 2014 dan 13.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(vii) Kesavan a/l Gurappan in HC Ipoh

AA-45JT-7-07-2020

Pertuduhan

Bahawa kamu di antara tahun 2014 dan 21.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(viii) Ganasen a/l Kupusamy in HC Ipoh

AA-45JT-8-07-2020

Pertuduhan

Bahawa kamu di antara tahun 2014 dan 13.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(ix) Prabu a/l Krishnan in HC Ipoh

AA-45JT-9-07-2020

Pertuduhan

Bahawa kamu di antara tahun 2014 dan 13.3.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

(x) Saravanan a/l Rajagopal in Ipoh HC

AA-45JT-10-07-2020

Pertuduhan

Bahawa kamu di antara tahun 2014 dan 17.7.2020, di dalam Daerah Kinta, Dalam Negeri Perak Darul Ridzuan, telah didapati menjadi ahli kumpulan jenayah terancang "Kumpulan Viki Naidu" dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 130V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

[7] By order of court made on 9 September 2020, the trial against all of the ten accused was ordered to be conducted jointly.

[8] As at 18 August 2021, a total of 11 days, namely 7 October 2020, 27 November 2020, 25 February 2021, 30 March 2021, 31 March 2021, 1 April 2021, 2 April 2021, 27 April 2021, 28 April 2021, 3 June 2021, 28 July 2021 have been expended for the joint trial with a number of days which were originally scheduled for hearing having to be vacated by reason of the Covid-19 pandemic and the several movement control orders put in place.

[9] On 2 April 2021, Inspector La Paula bin Abd Muis (SP6) was called as a witness for the prosecution. And, we now come to the part which led to the ruling or decision made on 18 August 2021.

Further Facts

[10] To underscore what has been said earlier, I repeat that I am not making any finding on the veracity of the evidence led to-date in this joint-trial, and continuing with the narrative on this basis, on 2 April 2021, Mr. Charan Singh proceeded with his cross-examination of SP6.

[11] The following are the relevant extracts of his cross-examination where questions were put by him based upon **his personal knowledge** (emphasis added):

S: Terdapat sesi taklimat? A

J: Itu 12/3

S: **Apakah yang diarahkan kepada awak oleh ASP Nor Azman?**

J: **Saya diarahkan untuk membuat tangkapan ke atas satu saspek bernama Ganesan a/l Durasamy.** B

S: Dalam kes ini awak beritahu Mahkamah bahawa awak telah tangkap saspek ini di kedai Nasi Kandar Habib?

J: Ya.

S: Ini berdasarkan maklumat bahawa saspek ini ingin menyerah diri? C

J: Saya terima maklumat bahawa Ganesan berada di kedai tersebut dan kita buat tangkapan.

S: **Setuju awak terima maklumat ini daripada ASP Zain?**

J: **Tidak.** D

S: **Saya katakan sebenarnya tangkapan ini dibuat oleh ASP Zain bukannya oleh awak?**

J: **Tidak setuju.**

S: **Saya katakan sedemikian kerana pada tarikh tersebut saya berada di Nasi Kandar Habib dan saya nampak siapa yang buat tangkapan?** E

J: **Saya tidak pasti.**

S: **Saya sendiri katakan bahawa saya bersama kawan saya ada di kedai Habib pada tarikh dan masa tersebut dan saya dan kawan saya nampak OKT ini ditangkap oleh ASP Zain bukannya awak?** F

J: **Saya yang buat tangkapan.** (emphasis added)

Matters Arising

[12] From the details of the cross-examination which have found its way into the court records, the court then queried learned counsel whether he himself is putting forward that he saw the arrest of the accused, Ganesan a/l Durasamy and he said yes but only on the arrest. When further queried by me on whether he is going to be a witness, he said no but he did agree that he is putting forward an issue as to who was the arresting officer. G

[13] It is clear that premised upon Mr Charan's assertion, there is a direct contradiction in that SP6 testified that he was the arresting officer of the accused, Ganesan a/l Durasamy and there is the assertion by Mr. Charan Singh from the Bar premised **upon his own knowledge that he was there at the time of the purported arrest by SP6 at Nasi Kandar Habib and that it was one ASP Zain who was the arresting officer.** (emphasis added) H I

[14] From the list of witnesses (exh. P4), the court notes that there is one ASP Nor Azman and one ASP Mohd Zain who are listed as witnesses to be called for the prosecution. This issue of who was the arresting officer of Ganesan a/l Durasamy would probably be raised to test *inter alia* their credibility.

[15] To a question posed by the court immediately after the aforesaid cross-examination by Mr. Charan Singh, the learned Deputy Prosecutor ("DPP"), Mr. Mohd Izhanudin bin Alias replied saying "saya perlu En Charan dikemukakan sebagai saksi untuk menentukan kebenaran keterangan ini."

[16] From the court's record of the evidence already led, the issue as to who was the arresting officer of the accused and whether a caution was administered at the time of the arrest had been raised during the cross-examination of three earlier witnesses. Some salient extracts of the notes of proceedings taken during the cross-examination by Mr. Nahtan s/o N. Krishnan, the lead counsel for the accused Vinodh a/l Siva (2), Anandh Kumar a/l Siva Kumar (5), Kesavan a/l Gurappan (7) and Prabu a/l Krishnan (8) are reproduced below:

Pemeriksaan Balas PB2 kepada SP1 di muka surat 33

S: Boleh beritahu Mahkamah yang mulia ini, apa Amaran yang awak baca kepadanya?

J: Amaran itu ada ditulis tetapi saya tidak hafal.

S: Awak tidak boleh beritahu Mahkamah yang mulia ini dan YA Hakim apa yang awak baca sebagai Amaran?

J: Ya.

Pemeriksaan Balas PB2 kepada SP2 di muka surat 56-57

S: Setelah awak buat tangkapan terhadap Tertuduh, ada awak beri apa-apa Amaran kepadanya?

J: Ada tetapi saya tidak ingat apa yang saya katakan.

S: Insp you are senior officer. Satu pegawai cakap tidak ingat, saya boleh terima. **Setiap pegawai yang cakap tidak ingat amaran, saya tidak ingat apa yang saya katakan, it makes inappropriate.** Tolong ingat dan beritahu Mahkamah.

Apabila membuat tangkapan apa yang telah awak terangkan kepada Tertuduh?

J: Saya telah terangkan kepadanya beberapa perkara.

S: Di bawah seksyen 4(2) – apa yang telah awak terangkan?

J: Pertama kali saya beritahu kepadanya sebab-sebab tangkapan, next saya ada diberikan satu folder di mana di dalam folder tersebut ada dokumen dan apa yang perlu saya katakan kepada OKT.

S: Ya, apa yang ada di dalam folder. By now you should memorise this.

J: No, saya tidak ingat.

S: Saya beritahu sebegitu awak tidak langsung bagitahu apa-apa amaran kepadanya? **Kerana awak tidak tangkap dia, itulah isunya. If you arrested him, you should have read the caution. Tetapi dalam hal ini, awak langsung tidak tangkap dia? Setuju dengan cadangan saya?**

J: **Tidak setuju.**

S: Apa yang awak katakan di Mahkamah saya ada memberitahu sesuatu tapi saya tidak ingat apa itu?

J: Betul.

Pemeriksaan Balas PB2 kepada SP5 di muka surat 120

S: Selain daripada keterangan ini, **adakah awak ada telah memberikan sebarang amaran lain kepada Tertuduh pada masa awak tangkap saspek?**

J: Amaran?

S: Any caution you warn to him?

J: Tidak berapa ingat. (emphasis added)

[17] The court then invited views from all learned counsel representing all the accused including Mr. Charan Singh as well as the learned DPP after drawing their attention to the provisions of r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 ("LPPER") which provides as follows:

28 Advocate and solicitor not to appear in a case where he is a witness

(a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

(b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.

(c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

[18] As the cross-examination on SP6 pertains to the arrest of Ganesan a/l Durasamy, Mr. Charan Singh suggested that what has been put forward by him be expunged from the court records with him continuing as counsel and this was supported by Mr. Vijayandran s/o K Thanigasalam for accused Saravanan a/l Rajagopal (10). An alternative suggestion put forth by

Mr. Charan was for him to discharge himself for accused Ganesan a/l Durasamy only but with him to continue as lead counsel for the other (four) accused whom he is representing. However, it was pointed out by the court to learned counsel that this is a joint-trial which meant that the evidence led will be used for all the accused.

[19] The trial was then adjourned for parties to return to court on 3 June 2021 for clarification on the issue of Mr. Charan Singh continuing, if at all, as counsel in the joint-trial with the joint-trial to resume on 15 to 18 November 2021. By reason of the Covid-19 pandemic and movement control order, the accused could not be brought to court on 3 June 2021 and 28 July 2021 and the matter for clarification was adjourned to 18 August 2021.

Clarification On 18 August 2021

[20] On 18 August 2021, submissions were presented by Mr. Charan Singh. He placed himself on record as mentioning on behalf of Mr Vijayandran s/o K Thanigasalam, counsel for accused, Saravanan a/l Rajagopal (10). Mr. Nahtan s/o N Krishnan, counsel for the accused Vinodh a/l Siva Kumar (2), Anandh Kumar a/l Siva Kumar (5), Kesavan a/l Gurappan (7) and Prabu a/l Krishnan (9) supported the submissions presented by Mr. Charan Singh.

[21] In summary, Mr. Charan Singh submitted that the issue of the arrest of accused Ganesan a/l Durasamy is not an important issue. He relied upon the following authorities; *PP lwn. Chong Yoke Choy* [1994] 3 CLJ 718 HC where Pn Zaleha Zahari PK (as Her Ladyship then was) relying on *Saminathan v. PP* [1936] 1 LNS 65; [1937] 1 MLJ 39 and *Saw Kim Hai & Anor v. Regina* [1955] 1 LNS 140; [1956] 1 MLJ 21 held that the issue of the legality of arrest was not important. However, with all due respect, the point is whether a material witness or maybe more who are involved in the arrest of Ganesan a/l Durasamy or possibly other accused is or are telling the truth and how their credibility will measure up to be assessed by the court at the end of the joint-trial. The relevance of their testimony have yet to be assessed and the evidence weighed.

[22] Mr. Charan Singh had also cited *Wee Choo Keong v. PP* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346; [1990] 2 MLJ 239 where the High Court held that r. 28 LPPER is a rule of ethics and the Magistrate should not have applied it with the stringency of law but later cases from the Court of Appeal such as *Ng Yee Hong v. Malaysian Institute of Accountants* [2021] 1 CLJ 666; *Lim Liah Wee v. PP* [2021] 7 CLJ 448; [2021] MLJU 840 CA and *Quah Poh Keat & Ors v. Ranjit Singh Taram Singh* [2009] 4 CLJ 316; [2009] 4 MLJ 293 have applied the LPPER to restrain counsel from acting. In *Quah Poh Keat* the Court of Appeal invoked r. 28(1) LPPER (*supra*) to disqualify not only the two counsel involved but their law firm from acting to avoid the

embarrassment during trial and to eliminate any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the conflicting parties were not compromised. See also *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing* [1997] 3 CLJ 754; [1997] 5 MLJ 705 where counsel and the legal assistant were barred from appearing when the former will be a witness.

[23] Mr Charan Singh also cited the case of *Ahmad Sultan VPS Abdulla v. MSZ Projects Sdn Bhd* [2018] 2 LNS 1203 to make the point that the prosecution is to give an indication as to whether counsel will be called as a witness and just because counsel has given a s. 112 Criminal Procedure Code statement, that is not sufficient to classify him as a material witness. The prosecution must have had a change of mind, because the learned DPP, Mr. Mohd Farhan Aliff b. Ahmad informed the court that as they (now) do not intend to call Mr. Charan Singh, there should be no bar to him acting.

Ruling

[24] It is only after the dust of conflict between the prosecution and the defence counsel has settled at the end of the prosecution case and, if necessary, at the end of the defence case, that it is for the court to weigh the evidence of each of the witnesses proffered to ascertain whether a *prima facie* case has been made out, and if so, whether the defence entered had rebutted the *prima facie* case.

[25] The role each is to play by the prosecution, defence and the court may be different but it is and should be with the common objective of ensuring that in the administration of justice, that each of the accused, no matter the number, is given a fair trial in accordance with the law with the integrity of the administration of justice to be preserved.

[26] Unlike the authorities cited by Mr. Charan Singh, whether it was ASP Zain or SP6, Insp La Paula who was in fact the arresting officer of Ganesan a/l Durasamy is a material fact that would go towards the credibility of SP6 who had taken an oath to tell the truth, the whole truth and nothing but the truth. It will play a part in assessing the credibility of the witness and whether this testimony will have a critical impact on the prosecution and the defence case is to be seen at the end of the prosecution case or, if relevant, the defence case. The extent of its ripple effect, if any, is yet to be assessed but at this stage, it is obvious that it will be likely to have an impact on the testimony of the one or more prospective witnesses such as ASP Zain. It may also have an impact on the credibility of the other arresting officers who had already been challenged by the other learned counsel.

[27] With all due respect to learned counsel and the learned DPP, in the administration of justice, the court should be careful to get to the truth and any piece of evidence that will assist, unless it is *de minimis*, no matter how inconvenient the truth may be, should be made available. On this, the

following excerpt from the Federal Court authority of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139, [1982] 1 MLJ 83 FC resonates with great force in this case where His Majesty the late Raja Azlan Shah (then Ag-LP) said:

> It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest (see the *Exclusive Brethren* case [1980] 3 All ER 161, 172). (emphasis added)

[28] The court was not minded to accede to the request by learned counsel to have the evidence already placed on record expunged as the court is of the opinion to do so would diminish the seriousness with which proceedings in court ought to be held. The integrity of the administration of justice will be severely tarnished if pieces of potential evidence which have been brought to light in court are to be swept under the carpet.

[29] Without casting any aspersions, I wish to quote from YA Tee Geok Hock JC's judgment in *Panetra Parking Services Sdn Bhd & Ors v. TTDI Harta Sdn Bhd & Another Application* [2021] 6 CLJ 129 HC where after applying the (Legal Profession Practice and Etiquette Rules) 1978 His Lordship held that:

> An advocate and solicitor, being an officer of the court, has a duty to assist the court in upholding the image and integrity of the system of administration of justice and not let personal or commercial interest prevail over such important matters.

[30] Premised upon and guided by the further following authorities including the case of *PP v. N Vengadasalam & Ors* [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893 which was both cited by learned counsel, Mr. Charan Singh and the learned DPP, En Mohd Sabri b Othman, where the High Court speaking through the late Lim Beng Choon J said "On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed." This court is of the view that in a suitable case, counsel can be and ought to be restrained from participating further in the case. These other authorities are:

(i) *Nivesh Nair Mohan v. Dato' Abdul Razak Musa*, *Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 8 CLJ 163 FC with the grounds of judgment furnished on 30 July 2021 where The Right Honourable Tun Tengku Maimun CJ said:

> [36] We pause for a moment here to note that our case law is replete with reminders to advocates – **whether from the Bar or public service** – of the onerous duties of those in the legal profession. The highest duty of counsel – a duty which supersedes his or her duty to his client – is his duty to the Court, which remains paramount in the administration of justice. Counsel are

> expected to make out their client's case to the best of their abilities but they cannot adopt the mindset that they must 'win at all costs' if that results in misleading the Court or approbating and reprobating before different panels of the Court.

(ii) *Ng Yee Hong v. Malaysian Institute of Accountants* [2021] 1 CLJ 666 CA as per Ravinthran Paramaguru JCA who when delivering the judgment of the Court of Appeal said:

> [29] As lawyers are officers of the court, apart from advancing the cause of their client, they have an overriding duty to the cause of justice.
>
> [17] We shall first refer to the existence of the inherent power of the court to control the right of audience and bar lawyers who appear to be in a conflict of interest position for the greater good of the administration of justice. In *Vijayalakshmi Devi Nadchatiram v. Sarawathy Devi Nadchatiram* [2000] 4 CLJ 870, the Federal Court recognised this inherent power. The Federal Court cited with approval the New Zealand Court of Appeal decision of *Black v. Taylor* [1993] 3 NZLR 403 which held that the court has inherent power to prevent a barrister from acting as counsel in a matter in which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done.
>
> [32] … The right to counsel of choice is not a trifling matter. However, the court should not flinch from striking a fair balance between the competing considerations of the right to counsel of choice and the broader interests of the administration of justice.

(iii) See also *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870 FC as well as *Ng Siew Lan v. John Lee Tsun Vui & Anor* [2017] 2 CLJ 245 FC;

[31] On Mr Charan Singh putting a direct challenge to SP6 during his cross-examination, in *Mohd. Zaharani Harun v. PP* [2021] 1 LNS 840, I had occasion to quote from the Federal Court case of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271, where Abang Iskandar FCJ (now CJSS) in the course of delivering the judgment of the Federal Court cited with approval the learned Justice Mahadev Shankar's article *"Putting and Suggesting in Cross-examination"* [1984] MLJ xi, in the following words:

> It is well established that when matters are 'put' in cross examination by defence counsel it is implied that positive evidence will be called to prove the matters put.

[32] With Mr Charan Singh having mounted that direct challenge against SP6 based upon his avowed personal knowledge which is not a fact which a court ought to take judicial notice of, he ought and should be aware of the consequences when putting a matter in cross-examination. Although

A *He-Con*'s case was to do with civil proceedings, with all due respect, the principle of "putting" to a witness, to my mind, applies equally in criminal proceedings. In the event, Mr Charan Singh were to lead positive evidence through himself, what was said in *Emperor v. Dadu Rama Surde* 1939 41 BOMLR 282 and reproduced below, becomes highly relevant:

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> An advocate cannot cross-examine himself, nor can he usefully address the Court as to the credibility of his own testimony, and a Court may well feel that justice will not be done if the advocate continues to appear.

[33] If the credibility of SP6 becomes material as the trial develops, or worse, at the end of the trial, it may become extremely prejudicial for the C accused if further inquiry premised on such a piece of evidence had not been taken further and developed. It is to be borne in mind that it is the accused who is on trial and not the counsel.

[34] Again without casting any aspersion, that what is important is the fate of the accused rather than the counsel can be seen in the Federal Court D authority of *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93; [2011] 1 MLJ 471 for the principle that a conviction for a criminal offence can be set aside if it is proven that the counsel representing the accused had been incompetent in handling the case as a whole and in particular, presenting the defence of the accused resulting in the said conviction being unsafe. See also the recent E Court of Appeal authority of *Yahya Hussein Mohsen Abdulrab v. PP* [2020] 1 LNS 1239 where the conviction and sentence against the appellant in the High Court was quashed by the Court of Appeal because of the flagrant incompetency of the appellant's counsel and a retrial ordered to be held with the appellant who had been detained in prison for a long time having to F continue to be detained in prison to await the retrial.

[35] In the circumstances, with the evidence on record in this case, with a heavy heart but for the sake of preserving the integrity of the administration of justice which we all serve, I am constrained to restrain Mr. Charan Singh s/o Kartar Singh from continuing to act for any of the accused in this joint G trial.

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